

## REFLECTIONS ON THE CONNECTION OF VIRTUE ETHICS TO THERAPEUTIC JURISPRUDENCE

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### I INTRODUCTION

Therapeutic Jurisprudence ('TJ') and virtue ethics are major parallel forces for good in legal practice. Both seek to understand and mediate frailness in human behaviour and explain why such 'goodness' is important for lawyers and their clients. But while a TJ practitioner and a virtue ethicist are often in agreement, they are fraternal rather than identical twins. This paper is addressed to those practising lawyers for whom TJ may become a central motivation to practice law, by reflecting on the moral advantages that virtue ethics can offer such practitioners in their daily decision making.

TJ studies the effects of the law on the wellbeing of those affected by it and proposes reforms directed to making the law and its dispute resolution processes psychologically optimal for all concerned. Although TJ is helped immeasurably if its practitioners are 'good' people, TJ has not historically required such goodness from them. A TJ approach to problem solving looks to a multitude of circumstances, constraints and objectives to, where possible, maximise a mutually acceptable and sustainable solution to conflict. It can also be used for other purposes, such as to ameliorate the potentially negative side effects of adversarial dispute resolution processes and to inform the development of law and legal processes.

In partial contrast, an ancient strand of legal ethics – the Aristotelian concept of *virtue* – values 'goodness' as a sign of personal 'flourishing', though not by entirely relegating techniques and 'effectiveness' to secondary importance.<sup>1</sup>

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1 Dale Dewhurst observes that while the emphasis is on goodness, this is not to ignore techniques and effectiveness: Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 1 (copy on file with authors). Dewhurst refers to Aristotle, who stated:

'Virtue' encompasses a number of personal qualities such as courage, honesty, gentility, benevolence, compassion, thoughtfulness and resolve. A virtue ethicist (as they are sometimes known) does not limit himself or herself to professional 'do' and 'don't' conduct rules or guidelines focussed on the categorical nature of technique *per se* or even the outcomes that might be promoted by a lawyer's actions. They allow themselves to pay less regard to categories and consequences; they consciously attempt to instantiate human virtues in themselves by acting in accordance with the principles of the virtues over the course of their life.<sup>2</sup>

A true practitioner of virtue is constrained by the thoroughness of their own embedded sense of good, which includes a sense of respect for the autonomy of their clients. This sense of respect is a major bridge to TJ. To adapt Anscombe's insight that moral philosophy now requires attention to the quality of the law-giver as well as to the law,<sup>3</sup> virtue ethics might now say to a TJ practitioner: you will achieve optimal therapeutic results if you also exhibit the virtues. Needless to say, a TJ practitioner may see this type of ethical injunction as encouraging paternalisms<sup>4</sup> or as self-indulgent sophistry and have nothing more to do with any

[I]f the acts that are in accordance with the virtues have themselves a certain character it does not follow that they are done justly or temperately. The agent must be in a certain condition when he does them; in the first place he must have knowledge, secondly he must choose the acts, and choose them for their own sakes, and thirdly his action must proceed from a firm and unchangeable character.

Aristotle, *Nicomachean Ethics* (WD Ross trans, Internet Classics Archive, 2005) book 2 ch 4  
<<http://classics.mit.edu/Aristotle/nicomachaen.mb.txt>>.

Aristotle also wrote: 'anyone can get angry – that is easy – or give or spend money; but to do this to the right person, to the right extent, at the right time, with the right aim, and in the right way, that is not for everyone, nor is it easy; that is why goodness is both rare and laudable and noble': at book 2 ch 9.

- 2 In so doing, they are not simply considering their own personal virtues (at a fixed point in time) as a way of guiding and deciding what is right or wrong in a particular situation. Dewhurst points out that this does not preclude a virtue ethicist from being guided by professional codes of ethics (at least for the most part and for so long as they are not contrary to virtue) and refers to Aristotle; according to whom:

[T]he equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is nonetheless correct; for the error is not in the law nor in the legislator but in the nature of the thing ... When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known.

Aristotle, above n 1, book 2, ch 10, cited in Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 1 (copy on file with authors).

- 3 Elizabeth Anscombe, 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1. In part, this insight supports the view that a legal positivism or legal realism approach is not enough; there are higher natural laws that must be respected.
- 4 Again Dewhurst comments:

circular connections. But in this article it is made clear that a TJ lawyer's objectives and methods characterise them as the sort of person who is also concerned with the redemptive power of their priorities and techniques. In being so concerned, they are likely also to identify with goodness.

## II WHAT IS THERAPEUTIC JURISPRUDENCE?

TJ is both a way of looking at the law, its processes and actors and a mechanism for promoting law reform.<sup>5</sup> Its touchstone is the wellbeing of those affected by the law. It asserts that the law – both statute and common law, and its processes and the actions of its officers, such as judges, magistrates, lawyers and police – has a positive, negative or neutral effect on the wellbeing of those affected, whether they are an accused, client, witness, victim or a general member of society. It draws on findings from the behavioural sciences relating to wellbeing to suggest new approaches to the drafting of laws, the conduct of legal processes and the way in which lawyers, judicial officers and other legal professionals work that minimise negative effects and promote positive effects on wellbeing.

Wexler notes that therapeutic techniques have been used in various ways by lawyers, judicial officers and other justice system officers in the past but asserts that TJ fills a gap by providing a conceptual framework for studying the therapeutic and anti-therapeutic effects of the law and the systematic use of

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It is one thing if the lawyer has a view of 'proper' virtuous behaviour based upon his own personal capacities and then tries to direct his client to live in accordance with those virtues; it is a different matter if the lawyer seeks to empower the client to identify and live up to the client's own potential for virtuous behaviour. For example ... Aristotle talks about the importance of finding the mean/virtue/excellence relative to the particular person: By the intermediate in the object I mean that which is equidistant from each of the extremes, which is one and the same for all men; by the intermediate relatively to us that which is neither too much nor too little – and this is not one, nor the same for all. For instance, if ten is many and two is few, six is the intermediate, taken in terms of the object; for it exceeds and is exceeded by an equal amount; this is intermediate according to arithmetical proportion. But the intermediate relatively to us is not to be taken so; if ten pounds are too much for a particular person to eat and two too little, it does not follow that the trainer will order six pounds.

Aristotle, above n 1, book 2 ch 6, cited in Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 1 (copy on file with authors).

5 See, eg, David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996); Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003). For resources on therapeutic jurisprudence internationally see David B Wexler, *International Network on Therapeutic Jurisprudence*, International Network on Therapeutic Jurisprudence <<http://www.law.arizona.edu/depts/upr-intj/>>. For resources on therapeutic jurisprudence in Australia and New Zealand, see The Australasian Institute of Judicial Administration ('AIJA'), *Australasian Therapeutic Jurisprudence Clearinghouse* <<http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse?task=view&id=206>>.

therapeutic techniques in the justice system.<sup>6</sup> TJ has been seen to be an important component of a trend towards more comprehensive, less adversarial and more psychologically attuned means of resolving legal disputes. That trend has been called ‘non-adversarial justice’<sup>7</sup> or the comprehensive law movement.<sup>8</sup>

TJ arose as a result of concerns raised by Wexler and Winick in the 1980s that although mental health laws are aimed at protecting and promoting mental health, the way in which they operated often produced anti-therapeutic effects.<sup>9</sup> They thought that this analysis of mental health law through the lens of wellbeing provided a useful tool for examining the effectiveness and possible unwanted side-effects of this body of law.<sup>10</sup> From this beginning, TJ has been applied to diverse areas of the law. While its principal applications have been in mental health law, criminal law, judging, legal practice and legal education, it has also been applied in international law, contract law, tort law, coronial law, family law, administrative law and workers compensation law. It is particularly influential in problem-solving court practice.<sup>11</sup>

TJ has a normative orientation. It equates the promotion of wellbeing or the minimisation of negative effects on wellbeing as good and the opposite as bad; all the time asking who benefits and who suffers in a particular situation and compelling a justification of that benefit or suffering. In this context, familiar concepts of ethical thought can be identified. ‘Who benefits and who suffers’ are questions asked by both consequentialists – in their common prioritising of the greatest good for the greatest number<sup>12</sup> – and Kantians, in their insistence that individual rights should not be automatically subordinated to wider social objectives.<sup>13</sup> But care for those involved could be an even stronger ethic of the TJ practitioner, in the sense that care involves an attentive attitude, encourages informed decisions and takes into account the individual’s preferences. Understood in these terms, an ethic of care might have a stronger intellectual appeal to the motives of TJ lawyers than these more well-known systems of

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6 David B Wexler, ‘Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering’ in David B Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008) 129.

7 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009).

8 Susan Daicoff, ‘Afterword: The Role of Therapeutic Jurisprudence in the Comprehensive Law Movement’ in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law As A Helping Profession* (Carolina Academic Press, 2000) 465.

9 See generally David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991).

10 Ibid.

11 Peggy F Hora, William G Schma and John T A Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’ (1999) 74 *Notre Dame Law Review* 439; Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) <<http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>>.

12 See, eg, ‘Consequentialism’ in Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (Cambridge University Press, 2<sup>nd</sup>ed, 1999) 176–7.

13 Ibid 460 ff, see entry ‘Kant, Immanuel (1724-1804)’.

ethics because the notion of care requires actual compassion for all affected by a particular legal process, in the interests of their overall wellbeing.

Thus, although it sees the law generally as a force for good, TJ understands that the application of the law may produce negative side effects<sup>14</sup> and asserts that the law, like the discipline of medicine, as far as possible should do no harm.<sup>15</sup> It accepts, though, that there are situations where that is not possible, such as in cases when a court imprisons an offender. Still, even in these cases TJ may suggest methods of minimising the negative effects on wellbeing of legal processes and laws.

However, the ideal of minimising negative side effects of the law is not the only reason why TJ values wellbeing. It sees that legal system goals, such as the rehabilitation of offenders, the recovery of injured workers and the healing of victims of crime, are often intimately connected with wellbeing. It sees the potential for the process of the law, in addition to any treatment or community support services, to have a healing effect. The way that a lawyer interacts with a client, the way a judge or magistrate treats a party in court and the use of special court processes, such as those used by drug courts and mental health courts, can enhance the law-related healing process.

Although TJ values wellbeing, it does not assert that it is necessarily the most important value that the law should promote in every situation.<sup>16</sup> On the contrary, it suggests that wellbeing should be considered along with other values that the law and legal processes should promote. The weight to be given to wellbeing would depend on the circumstances. Thus, a lawyer may advise a client that going through the process of a trial in relation to a civil claim for damages arising out of an assault or accident may be particularly traumatic given the nature of the evidence that the client must give and a likely challenge to their credibility in cross examination but that the amount that the client is likely to recover at trial will be more than the inadequate final offer to settle made by the other side, the acceptance of which would avoid the trauma of a trial.

Slobogin points out in connection with TJ that the concept of wellbeing is very broad.<sup>17</sup> Conceivably it could encompass physical, psychological, emotional, relational, social and economic dimensions. However, Wexler and Winick have limited TJ to the physical and psychological dimensions of wellbeing.<sup>18</sup> More recently Wexler commented that TJ 'focuses on the law's impact on emotional life and on psychological well-being'.<sup>19</sup> Even within that

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14 David B Wexler, 'An Introduction to Therapeutic Jurisprudence' in David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) 19.

15 Ibid 19–20.

16 David B Wexler and Bruce J Winick, 'Introduction' in David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) xi.

17 Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193.

18 David B Wexler and Bruce J Winick, 'Introduction' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996), xvii.

19 David B Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125.

more limited definition there can be different nuances and competing values and perceptions of wellbeing. In the case of our lawyer advising a client on whether to proceed to trial or settle, for example, while there is the potential trauma for the client of taking the matter to trial there may also be the psychologically beneficial result of a court judgment vindicating the client's story and providing relief that can promote the client's healing.

But there are still two criticisms with TJ as it is commonly conceived. One of these problems is concerned with the ethical identity of the TJ lawyer and the other related issue involves the impact of that identity question on others' autonomy. It is in these two dimensions that common approaches to legal ethics take TJ only so far and compel a search for a more satisfactory system of ethics, which can meet these objections and provide a deeper moral footing for TJ.

What has not been discussed as widely as desirable in careful TJ lawyering is the vulnerability of the movement to charges of paternalism. Implicit to TJ and its emphasis on others' wellbeing is a logic that assumes the neutrality and, in some cases, the superiority of the lawyer in the whole process. Although nothing in the TJ literature justifies this view, it could be postulated that all TJ lawyers are equally beneficent, equally courageous, and equally tolerant and indeed, considered to be equally possessed of all the virtues enumerated above. While this prescription is unlikely to be empirically accurate, there is nevertheless an implicit *requirement* to develop these virtues in effective TJ practitioners, including the personal quality not mentioned: self-awareness of the risks of pride.

This allegation of paternalism is not accurate because the desire for goodness in oneself and in another is an expression of practical wisdom rather than a perversion.<sup>20</sup> Such desire does not negate TJ and the power of its redemptive

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20 TJ in itself is against paternalism. It stresses that paternalism and coercion are anti-therapeutic. This is clear in the writings of Winick and Wexler: see eg Winick and Wexler (eds), *Law in a Therapeutic Key*, above n 5; Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705. But some have purported to be applying therapeutic jurisprudence in taking a paternalistic approach. Some drug courts (and some other problem-solving courts) can provide examples. By asserting that these courts solve defendants' problems they are explicitly taking a paternalistic approach. See David B Wexler and Michael S King, 'Promoting Societal and Juridical Responsibility to Rehabilitation: The Role of Therapeutic Jurisprudence' (Arizona Legal Studies Discussion Paper No 10-46, October 2011). TJ does not assume the superiority of the lawyer (or judicial officer), but sees the client as the autonomous change or solution agent with the lawyer providing advice and support. It is only a corruption of the TJ approach that leads to the criticisms made. See also Michael S King, 'Should Problem Solving Courts be Solution-Focused Courts?' (2011) 80 *Revista Jurídica de la Universidad de Puerto Rico* 1005. Dewhurst also observes:

Essentially, there is a distinction to be drawn between the lawyer's personal capacities and, thus, his capacity for virtue; and, the client's personal capacities and, thus, her capacity for virtue. It can be a virtuous goal for development of the lawyer's character to promote justice overall by supporting the client's efforts to act virtuously. There are times when the lawyer may determine that a proposed action is vicious (ie, a vice) and advise against it – is this paternalistic or a demonstration of practical wisdom?

See, eg, Aristotle, who wrote:

agenda within wider jurisprudence, but suggests that it will avoid the superficial charge of hubris and be stronger still if it makes its ethical assumptions about its practitioners more widely known and links their observance of these virtues, in particular the virtue of self-awareness, in the interests of its own maturity and of its numerous stakeholders. This theme is revisited later in this paper.

### III THE IMPLICATIONS OF TJ FOR LEGAL PRACTICE

TJ has implications for how a lawyer perceives a client and the client's legal problem and how the lawyer interacts with and approaches assisting the client to resolve the legal problem. By reason of its emphasis on overall wellbeing, TJ ought to see the importance of a lawyer first understanding their own psychological needs and ethical priorities, before appreciating the emotional and psychological dimensions of the client as they relate to a legal problem and its resolution.<sup>21</sup> For example, it may be the client's inability to deal with particular emotions that causes a legal problem, renders them susceptible to future legal problems and/or hinders their ability to resolve their legal problem. The principal problem of a client who wishes to 'sue the bastards' may have less to do with having a meritorious case at law and more to do with being unable to deal with intense anger arising out of a situation where they were unable to achieve what they had intended.<sup>22</sup> In such a case, a mature TJ suggests the lawyer should first identify and place to one side any frustration they may feel about the effect of their client's anger on their decision-making and then use their interpersonal skills to help the client work through the feelings concerning the legal problem and, where necessary, refer the client for counselling.<sup>23</sup>

For other clients, there may be underlying problems that have created ongoing legal problems. A common example is the criminal client who has significant alcohol and/or illicit drug problems that contribute to ongoing offending. Here the TJ lawyer's task is not only to demonstrate interpersonal skills including the ability to detect and manage emotions in oneself and others,

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Virtue, then, being of two kinds, intellectual and moral, intellectual virtue in the main owes both its birth and its growth to teaching (for which reason it requires experience and time), while moral virtue comes about as a result of habit ... From this it is also plain that none of the moral virtues arises in us by nature; for nothing that exists by nature can form a habit contrary to its nature. ... Neither by nature, then, nor contrary to nature do the virtues arise in us; rather we are adapted by nature to receive them, and are made perfect by habit. Again, of all the things that come to us by nature we first acquire the potentiality and later exhibit the activity ... but the virtues we get by first exercising them ... we learn by doing them, eg, men become builders by building and lyre players by playing the lyre; so too we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts.

Aristotle, above n 4, book 2 ch 1, cited in Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 5 (copy on file with authors).

21 See generally Stolle, Wexler and Winick, above n 8; David B Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008).

22 Bruce J Winick, 'Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer' in Marjorie A Silver (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (Carolina Academic Press 2007) 341.

23 Ibid.

but then also to use techniques that help raise the client's awareness of the significance of the underlying issues in relation to the legal problem and to help motivate the client to address these issues.<sup>24</sup> That requires the lawyer to understand the process of positive behavioural change in itself – such as is propounded in the Transtheoretical Stages of Change Model – and skills in applying techniques, such as motivational interviewing to support the change process in others.<sup>25</sup>

In drawing from findings and techniques of behavioural sciences to suggest alternative legal practice techniques and judging processes, TJ does not suggest that lawyers should become psychologists or social workers. But it does recognise that the law and the behavioural sciences share an interest in the nature of the human psyche and human behaviour, and the mechanics of positive behavioural change. That focus logically covers both clients and practitioners. Humanistic psychologist Carl Rogers observed that what is found to be true in the interaction between client and therapist may have a broad application in human experience generally.<sup>26</sup> It therefore makes sense for the law to consider whether the behavioural sciences can assist in developing therapeutic aspects of the law and its processes.

This approach does not mean that the TJ lawyer abandons the traditional skills and knowledge of the law required for legal practice.<sup>27</sup> Rather it will increasingly require an expanded vision of the nature of their own psyche and ethical priorities and those of their client, of the legal problem and the skills required to address legal problems. A therapeutic approach also does not mean that the lawyer abandons traditional adversarial approaches.<sup>28</sup> It does not mean that the lawyer will always favour mediation, conciliation and other alternative processes to dispute resolution – although a TJ lawyer will acknowledge their value and use them in appropriate cases. As noted above, at times therapeutic outcomes require an adversarial process. But in such cases TJ suggests ways of conducting a case that minimise adverse effects on wellbeing, such as by involving the client in the development of trial strategy and regular, open, mutually respectful and empathetic communication between lawyer and client.<sup>29</sup> It is the virtue of respecting oneself and others that is critical here in combating any tendency to lawyer paternalism through influencing client decisions.

TJ is also not an 'all or nothing' affair when it comes to legal practice. Some lawyers may decide to systematically apply its principles and practices in all of

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24 David B Wexler, 'An Introduction to Therapeutic Jurisprudence', above n 14; Deen Potter, 'Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence' (2006) 1 *Murdoch University Electronic Journal of Law* 95.

25 Astrid Birgden, 'Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counselling' (2002) 38 *Criminal Law Bulletin* 225.

26 Carl R Rogers, *A Way of Being* (Houghton Mifflin, 1980) xvi.

27 David B Wexler, 'Not Such a Party Pooper', above n 6, 129.

28 Ibid.

29 Bruce J Winick, 'Therapeutic Jurisprudence and the Role of Counsel in Litigation' in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 309.



their work.<sup>30</sup> Others may seek to apply TJ principles when the needs of the client and the circumstances of the case require it. Some legal cases are devoid of ethical implications, as for example, whether it is appropriate to drive on the left or right side of the road. But there is always an application of TJ principles in an interaction between lawyer and client. A client is more likely to be satisfied with a lawyer who listens and acknowledges the client's emotional and legal concerns, even in otherwise 'dry' areas of law. Tax law may seemingly have little TJ application but the way in which a tax lawyer interacts with a client may well affect the client. A client may be devastated by an adverse finding by the taxation authorities, for example. It is not that the TJ 'switch' (or the virtue ethics switch) is turned on or off in such situations – just that some client interactions have a more easily identifiable TJ application. There may also be differences between practitioners and their (autonomous) clients as to what is the best approach to take to promote a therapeutic outcome – just as there may be differences on this point between behavioural science professionals.

Some argue that applying TJ in legal practice is in a sense a return to a more traditional version of legal practice – of being legal counsel or what has been called in the United States a 'counsellor and attorney at law' – providing not only advocacy but also worldly-wise, practical advice and impartial support to the client.<sup>31</sup> While in essence, TJ has always envisaged a cooperative relationship between lawyer and client rather than one that involves the client delegating to the lawyer the responsibility for resolving the client's problems, the mutuality of its processes does require a renewed, more open emphasis. Indeed, from a TJ perspective it is important that the lawyer, without an overlay of superiority, uphold their client's strengths in addressing legal problems and their ability to identify and address their weaknesses. In this sense, TJ does see client self-determination as an essential requirement for client wellbeing, including client respect for the lawyer and the legal process.<sup>32</sup>

## IV WHAT IS ETHICS AND WHAT ARE VIRTUE ETHICS?

### A Ethics and Jurisprudence

Ethics and jurisprudence sit together in a necessary state of discomfort. Ethics – derived from the Greek *ethikos* (or *ethos*, meaning 'nature' or 'disposition'<sup>33</sup>) – is concerned with moral philosophical questions about personal inclination, choice and eventually judgment in society generally. But while jurisprudence also has this descriptive quality, it is primarily a philosophical

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30 David B Wexler, 'Not Such a Party Pooper', above n 6, 130–3.

31 Dennis P Stolle et al, 'Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Approach to Lawyering' in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law As A Helping Profession* (Carolina Academic Press, 2000) 5, 43.

32 Winick, 'On Autonomy: Legal and Psychological Perspectives', above n 20.

33 Bruce Moore (ed), *The Australian Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 430.

system of law, with narrower frames of choice than more general ethical frameworks.

Both jurisprudence and various ethical frameworks can emphasise moral neutrality, but in the public arena ethics has increasingly focussed on moral choice to the extent that ‘ethics’ and ‘goodness’ may now be popularly seen as synonymous.<sup>34</sup> However, it is very possible to reach different conclusions as to the good or right thing to do (or at least to ‘do no harm’<sup>35</sup>), depending on the chosen framework. Thus the impact of consequentialism<sup>36</sup> in the last three centuries, with its enormous emphasis on the ‘greatest good for the greatest number’, has not by any means overshadowed Kant’s insistence of the ‘good’ that comes from prioritising individual rights. Both these major systems of ethical thought are, for present purposes, toiling in adjacent fields: they both look to champion goodness and rightness, depending on the system chosen.<sup>37</sup> For

34 It might be suggested that ethics and goodness are more synonymous for the consequentialists and teleologists; whereas ethics and duty/right are more synonymous for the deontologists and legal positivists, but we think it clear that deontologists’ focus on rights and duties is *instrumental* only and that their objectives (as much as teleologists look towards good outcomes) are always to promote ‘good’ processes and the ‘good’ observance of rights.

35 The so-called Hippocratic Oath enjoins members of the medical profession to ‘do no harm’ when they can do no good and there is an argument that such an obligation should extend also to lawyers. See Julius Rocca, ‘Inventing an Ethical Tradition: A Brief History of the Hippocratic Oath’ (2008) 11 *Legal Ethics* 23; ‘Symposium: A Hippocratic Oath for Lawyers?’ (2008) 11 *Legal Ethics* 41; Adrian Evans, ‘Ethics: First, Do No Harm...’ (2008) 82(6) *Law Institute Journal* 86.

36 See Audi, above n 12, 177. Consequentialism is not the same as utilitarianism, but a general overarching category which includes utilitarian thinking. A consequentialist will hold that acts which promote a variety of overall dimensions of goodness (eg, happiness, knowledge, achievement, etc) are ethical, while a utilitarian is narrower and will tend to prioritise acts which preference the happiness of sentient beings as more important in determining what is truly ethical. See also J Rachels and S Rachels, *The Elements of Moral Philosophy* (McGraw-Hill, 6<sup>th</sup> ed, 2010) chs 7–8.

37 Dewhurst observes that there is a common distinction between the good and the right. He comments: The ‘good’ is often explained in connection with some higher order justification and is more intimately tied to the question of good ends (consequentialism and teleology); whereas the ‘right’ is more codified and has been given a more rigid conception and focuses on duties either through the dictate of reason or some other religious or moral code. Thus, in many senses, the consequentialists and teleologists are talking about the good and Kant is talking about the right. Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 7 (copy on file with authors).

This debate can however exclude the sense of overriding ‘goodness’ referred to in n 34, above. See also Anthony Skeleton, *William David Ross* (19 June 2012) Stanford Encyclopaedia of Philosophy <<http://plato.stanford.edu/entries/william-david-ross/#RosDisMorFraRigGoo>> for a summary of Ross’ work on the right and good. As for Kant, it can be said that he is not particularly concerned about the ‘good’ at all. Kant writes:

*Duty is the necessity of acting from respect for the law ... Now an action done from duty must wholly exclude the influence of inclination, and with it every object of the will, so that nothing remains which can determine the will except objectively the law, and subjectively pure respect for this practical law, and consequently the maxim that I should follow this law even to the thwarting of all my inclinations.*

Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (TK Abbott trans, Prometheus Books, 1987) 25 [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)] (emphasis added), cited in Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 7 (copy on file with authors).

example, many lawyers are confronted with ethical challenges in taxation: they might choose to evade paying income tax by failing to declare cash receipts as income, or remain silent when they observe the same practice in close friends and relatives. Many will be aware of at least one income payment received by a relative in cash and will be almost certain that it will not be declared to the Tax Office. Behaving as ordinary citizens (perhaps with a tendency to remain silent because of laziness), lawyers might if pushed justify their inaction on any number of wider moral philosophical bases: for example, income tax commands no legitimacy because it is increasingly regressive and benefits the rich at the expense of the poor (a consequentialist view); or defrauding the Tax Office is a quasi-acceptable characteristic (at the least, moral evasion); or particularly because the maintenance of personal relationships is arguably more important than remote public purposes (elements of care and virtue). Often, lawyers have to balance conflicting goods and rights. Clearly, there can actually be various legitimate right/wrong conclusions in any particular case.

But if lawyers are also people of conscience faced with decisions *in role* and not just as citizens, they cannot so easily avoid considering the wider jurisprudential question: what does their silence as tax advisors do to undermine the fabric of the so-called ‘thick’ (as opposed to the ‘thin’<sup>38</sup>) version of the rule of law? If the thin version of the rule of law is credible, then it is much harder for all lawyers, especially TJ lawyers, to be ‘good’ in the sense proposed here. This broad question of the nature of lawyers’ obligation has received recent major attention in a debate reignited by Daniel Markovits,<sup>39</sup> who has in broad terms reasserted not just the right but also the obligation of an advocate in a robust democracy to ‘lie’ and ‘cheat’ when necessary, as some have pointed out.<sup>40</sup>

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In our view however, it is not necessarily the case that a focus on rightness must be divorced from concern for goodness, at least for TJ practitioners. A TJ lawyer who wishes to see the law observed (rightness) will often believe that that observance is also in the long-term best interests of their client (goodness).

38 The terms ‘thick’ (or substantive) and ‘thin’ (or formal) conceptions of the rule of law are used here to denote respectively, the desirability of lawyers’ broad allegiance to law as a general principle of social harmony, with which few would disagree, and the narrower view that lawyers need only seek to comply with precise, confined obligations set out in the clearest of language. A consequence of the different approaches is that laws which are written in principled format and therefore (generally) embody some notions of morality and permit some ambiguity in their interpretation, are not only capable of selection or dismissal by a zealous (‘thin’) lawyer, but also in a sense *contemplate* their own avoidance, if it is accepted that the rule of law requires only the narrowest (most ‘thin’) of compliance within an economic and social understanding that clearly prioritises individual autonomy (or selfishness) over collective responsibility, or selflessness. See, eg, Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

39 See Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2008).

40 Alice Woolley in particular, has pungently identified Markovits’ perspective in these terms. See Alice Woolley, *Markovits and the Immanent Rationality of the Law Governing Lawyers* (1 May 2009) Legal Ethics Forum <<http://www.legalethicsforum.com/blog/2009/05/markovits-and-the-immanent-rationality-of-the-law-governing-lawyers.html>>; Alice Woolley, *Is Diversity Really the Enemy of Community (More On Markovits)?* (5 May 2009) Legal Ethics Forum <<http://www.legalethicsforum.com/blog/2009/05/is-diversity-really-the-enemy-of-community-more-on-markovits.html>>.

Markovits' championship of a very thin understanding of the rule of law comes from his apparent conviction that, since ordinary democratic society is based on egalitarian and impartial ideals, advocates exist (at a 'genetic'<sup>41</sup> level) to argue for individuals faced by this egalitarian impartiality and in doing so must give some weight to client-centered ideals. So stated, these premises are unremarkable, but they do not automatically justify deception and disingenuous interpretations of laws quite outside those intended by their drafters. They must also be balanced against wider overall ideals of the same system to ensure reasonable, fair and effective access. Because of his egalitarian and impartial democracy premise, Markovits does not see the need to prioritise the latter notions of fairness over the former acceptance of the carefully expressed lie, and particularly for present purposes of lawyers' virtue and any therapeutic consciousness, does not seem to worry unduly about any consequential effect on their individual psyche or that of others similarly impacted.

But fundamentally, this generalised argument for a thin zealous advocate seems itself very lightly grounded and has not been helped a great deal by moral philosophy's adoration of similarly thin concepts of role morality. As Simon puts it:

Moral philosophers appear occupationally prone to take an interest in 'role morality.' Some appear to find the same excitement in discovering role-based norms that defy ordinary morality that astronomers take in discovering a planet whose movement deviates from the laws of physics. Advocacy norms that license deception or opportunism fit the bill exactly.<sup>42</sup>

Simon and others<sup>43</sup> have convincingly sidelined the view that lying and cheating are *morally* permissible for lawyers, making it clear that any currently perceived gaps between notions of ordinary morality and so-called role morality are, in the United States context at least, an interruption to earlier trends rather than a fixed position<sup>44</sup> and that what is within or without the bounds of law in its broadest sense requires, in this era, regard for a large range of norms and not just those which 'take the form of commands or "rule"'.<sup>45</sup> It is also suggested that the broader, thicker understanding of the rule of law is more highly regarded than the narrower version outside the United States<sup>46</sup> and that accordingly, it is reasonable

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41 See Daniel Markovits' response to Alice Woolley: Daniel Markovits, *Daniel Markovits Responds to Alice Woolley* (7 May 2009) Legal Ethics Forum <<http://www.legalethicsforum.com/blog/2009/05/daniel-markovits-responds-to-alice-woolley.html>>.

42 See William H Simon, 'Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987, 992.

43 See, eg, Woolley, above n 40.

44 Simon, above n 42, 1007 ff.

45 Ibid 1000.

46 See generally Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon University Press, 1995); Julian Webb and Donald Nicolson, 'Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession' (1999) 2 *Legal Ethics* 148; Mark Potter, 'The Ethical Challenges Facing Lawyers in the Twenty-first Century' (2001) 4 *Legal Ethics* 23; Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (Butterworths, 2000); Julian Webb, 'Being a Lawyer/Being a Human Being' (2002) 5 *Legal Ethics* 130; Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999).

to ask of lawyers of all types that they be zealous, when necessary, within the bounds of generally accepted notions of right and wrong.

For any lawyer, the personal ethical challenges of citizenship are overlaid by this more perplexing jurisprudential consciousness, and that consciousness still seems to require that they deal with the blandishments of those who argue that lying and cheating is acceptable within role, provoking a cognitive tussle which it is hoped will re-identify a primary loyalty to moral rather than just rule-based behaviour. Dewhurst describes this as the important distinction between the 'good' and the 'right'.<sup>47</sup> And if all this is plausible, is the ethical duty of a TJ practitioner even higher than that of any other lawyer who professes nothing more than to argue strenuously for their client's interests within a 'thick' understanding of the rule of law?<sup>48</sup> The answer is no, even if a TJ lawyer might be more self-aware. The ideal of a 'thick' zealous advocate is neither a bad pun nor an oxymoron. That person can also closely identify with TJ. Such an individual is profoundly concerned for a liberal rule of law because it provides the only robust mechanism through which truly zealous advocacy can occur and seek to avoid the various charges of advocates' self-interest, misleading conduct and even economic vandalism.<sup>49</sup> And such a zealous advocate will very naturally wish to consider the wellbeing effects (on their client) of a proposed course of action he or she advises that client to take, even if they are also adherents of other systems of ethics in particular circumstances and environments.

### **B Systems of Ethics**

As indicated above, the idea of ethics – that is, what seems 'moral' to an individual – does not in itself imply propriety. The individual values that underlie ethical constructs are clearly highly variable, leading to moral and immoral

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47 Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 9 (copy on file with authors).

48 An argument that can be made here is that the functional duties of a TJ practitioner ought to provide ethical duties for all lawyers. In a sense, both TJ practitioners and 'all lawyers' in general might be said to be held to the thicker range of ethical duties imposed by 'the good', rather than the thinner range justified by zealous arguments about the nature of 'the right'.

49 A thin understanding of the rule of law arguably permits legal interpretation of otherwise lawful obligations in such a way as to avoid expensive compliance, compliance which in many cases had been adjudged necessary for a host of environmental, occupational health and safety and human dignity reasons. A contrived 'moral' avoidance of these obligations through thin zealous advocacy can delay and therefore often increase downstream economic costs associated with the avoidance, at least to the extent that a delayed 'clean up' is often a more expensive clean up.

ethical positions. Always, there is a choice to *be* moral<sup>50</sup> or to be immoral (unethical), but even if that is recognised and accepted by most lawyers, is that sufficient for lawyers who see themselves as wedded to TJ? It is suggested that their ethical behaviour consists not just of what is ‘proper’, but also what is ‘good’, or both. Understanding goodness, however, requires further delineation.

A well-known categorisation of ethics has been developed to try to come to grips with the complexities of the correct or best ethical choice. This is the moral philosophical trio of concepts known as *consequentialism*, *deontological theories* (derived from the Greek word for ‘duty’) and *virtue ethics*.

Each of these methods<sup>51</sup> provides a notionally separate way forward for everyone, including lawyers, to decide or judge morally complex matters. In highly simplified terms:

[Consequentialists] are ...prepared to see individuals suffer when there is a greater good ... at stake. They equate ethics with numerical survival of the greatest number [for the greatest good] and their consequential or teleological perspective is both common and compelling...

Kant is the best known of the alternative ‘deontologists’, who value rights and fairness over consequences. His ‘categorical imperative’<sup>52</sup> originally required only benevolence and fidelity but more recently, ‘Kantianism’ has shifted to the ‘moral rights’ of others, so that ... [r]ights rather than ends or consequences... [are the priority]...

Transcending both these approaches are *virtue ethics*, an ancient (but increasingly rejuvenated) character-based philosophy derived from Aristotle’s *Nicomachean Ethics*.<sup>53</sup> Lawyers accustomed to hard-nosed environments will tend to glaze over at the mention of classical scholarship, but ignoring virtue ethics as worthy of understanding would be a costly decision in itself. The virtue ethicist is a ‘good’ person and therefore supposedly makes ‘good’ decisions regardless of rights or consequences. [Their orientation is capable of incorporating other major ethical approaches because they are in]... ‘a state of contentment, a life integrated happily with a sense of purpose, lived out in community.’<sup>54</sup> The qualities that such a person exhibits in order to achieve a proper life are the *virtues*. Together, the virtues: courage; temperance; magnificence; pride; good temper; friendliness;

50 That is, for the sake of future discussion, to be ethical in the positive sense. However for present purposes, ethics and morality are used as interchangeable terms. Rhode and Luban ‘doubt the usefulness of any general distinction between ethics and morality’: Deborah L Rhode and David Luban, *Legal Ethics* (Foundation Press, 2<sup>nd</sup> ed, 1995) 4. Rhode and Luban observe that others have drawn distinctions between the two concepts, but they see the distinction as spurious. While Hegel speaks of ethics as the customary norms within a specific society (see GWF Hegel, *The Phenomenology of Spirit* (AV Miller trans, Oxford University Press, 1977) 266–94 [trans of: *Phänomenologie des Geistes* (first published 1807)]) and others have spoken of a sharp distinction between theory-based morality and a custom-based ethics, Rhode and Luban ‘believe that philosophical theories of morality arise from common sense ethical reflection and in turn, influence it’: Rhode and Luban, above n 50.

51 See Marcia Baron, Philip Pettit and Michael A Slote, *Three Methods of Ethics – A Debate: For and against Consequences, Maxims and Virtues* (Blackwells, 1997).

52 Immanuel Kant, *Foundations of the Metaphysics of Morals* (Lewis W Beck trans, Bobbs-Merrill, 2<sup>nd</sup> ed, 1990) 46 [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

53 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001); Tim Dare, ‘Virtue Ethics and Legal Ethics’ in Duncan Webb (ed), *Seven Essays on Professional Ethics* (Victoria University of Wellington, 1998) 141.

54 Noel Preston, ‘Virtue-Theory – Links to Professionalism’ in *Understanding Ethics* (Federation Press, 2<sup>nd</sup> ed, 2001) 58.

truthfulness; wittiness; shame and justice; to which Aquinas added faith, hope and charity,<sup>55</sup> constitute the ethical life.<sup>56</sup>

If consequential thinking dominates a lawyer's consideration of an ethical problem, then they will focus on the end game and may seek to exclude any doubts about whose interests will have to suffer (denying the Kantian imperative), along the way. For example, a not uncommon approach of a criminal lawyer faced with defending a client who is likely guilty of a serious assault will be to focus on the objective of achieving a 'not guilty' result and refuse to allow their client to tell them 'exactly what happened'.<sup>57</sup> In other words, if they do not *know* as a matter of fact that their client is guilty because that have in effect warned them not to confess, then the consequential objective of securing an acquittal will not be subverted by the Kantian inconvenience involved in the likely subversion of victims' suffering.<sup>58</sup>

The ethical propriety of their actions as zealous advocate is traditionally the only focus in choosing between consequences and Kantian duty, but propriety in these narrow terms alone (which typically can be limited to rule compliance, particularly rules that exonerate what might otherwise seem doubtful) is not really enough in a TJ context, as seen above. If the lawyer asserts a therapeutic approach, then their focus on psychological and emotional wellbeing will mean that they will emphasise the value of compassion. Aquinas recognises the value of compassion but considers it to be an interior aspect of the virtue of charity.<sup>59</sup> Practitioners of positive psychology see it to be part of kindness, an important character strength and virtue.<sup>60</sup> Compassion is cherished in other traditions, such

55 Thomas Aquinas, *Summa Theologiae* (c 1224–74), I–II, 62, a 1.

56 Adrian Evans, *Assessing Lawyers' Ethics: A Practitioners' Guide* (Cambridge University Press, 2011) 68–9 (emphasis in original, footnotes in original). Dewhurst comments that 'numerical survival of the greatest number' is too bold a statement for some consequentialists. He also observes 'Mill did not support this position and thought that there were higher goods. For consequentialists like Mill, you only do harm to a few in favour of the many when harm is inevitable and you must choose one or the other to suffer a negative consequence. It is not a matter of imagining a positive benefit to many and then sacrificing a few to achieve it. For Mill, the goal of utilitarian action is to secure the virtues for all of mankind, the whole of sentient creation; and there are times when the individual must sacrifice for the good of all': Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 9 (copy on file with authors).

57 It is irrelevant that Professional Conduct Rules usually appear to endorse this 'creative' silence on the part of the advocate, because such rules do not (and could not) proscribe an advocate asking their client 'exactly what happened'. See, eg, Law Council of Australia, *Australian Solicitors' Conduct Rules* (June 2012) <[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=D997CD53-92D0-1795-82F7-5436F67E9BCD&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=D997CD53-92D0-1795-82F7-5436F67E9BCD&siteName=lca)>.

58 Dewhurst adds that the zealous defence justification is also reasonably based upon the argument that in looking after his client's interests alone, the lawyer supports the overall health of the legal system: Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 10 (copy on file with authors).

59 Judith Barad, 'The Understanding and Experience of Compassion: Aquinas and the Dalai Lama' (2007) 27 *Buddhist-Christian Studies* 11, 17–9.

60 Christopher Peterson and Martin E P Seligman, *Character Strengths and Virtues: A Handbook and Classification* (Oxford University Press, 2004).

as the Vedic, Buddhist and Muslim traditions,<sup>61</sup> and is perhaps the defining contribution of TJ to the TJ–ethics intersection.

It is difficult to see how such a lawyer can indefinitely avoid considering their own virtues – their sense of goodness or otherwise – if they are constantly asserting the need for compassion. To do otherwise is likely to provoke psychological disintegration over the long term. An effort might therefore be needed to redefine ‘propriety’ so that proper (ethical) behaviour is usually also ‘good’ behaviour, even if that is not always obvious.<sup>62</sup>

Of course, resort to virtue ethics by defence counsel cannot occur on the spur of the moment. It is highly likely that any such instantaneous self-examination, undertaken for the first time in the midst of trial preparation, will achieve nothing except a sense of confusion for the practitioner.<sup>63</sup> But that need not be the case if, before these challenges arise, effort is put into considering *who I am* as a TJ defence counsel and not just what strategy I can reasonably adopt in future defences. Figure 1 below sets out the alternative ethical approaches available to a TJ practitioner and the possibility that a ‘virtue arc’ – a posited set of virtues needed for a whole-of-problem orientation which transcends both consequential and Kantian methods – is an appropriate choice:

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61 Barad, above n 59; Bina Gupta, ‘Bhagavad Gītā as Duty and Virtue Ethics’ (2006) 34 *Journal of Religious Ethics* 373; Fatima Agha Al-Hayani, ‘Muslim Perspectives on Stem Cell Research and Cloning’ (2008) 43 *Zygon* 783.

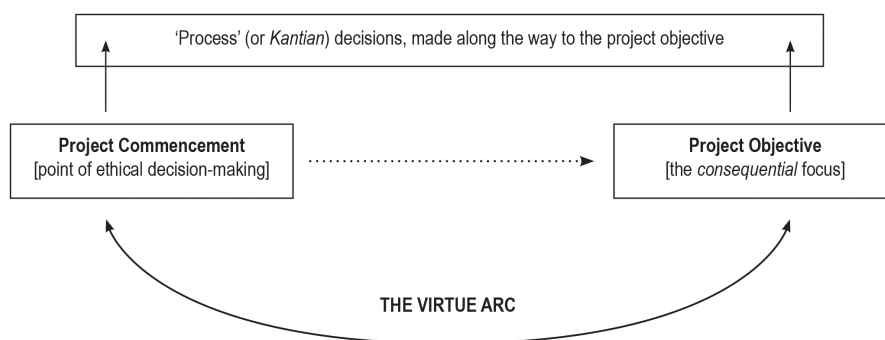
62 Paradoxically, goodness may sometimes require dispensing with a clear rule if its effect is to limit ‘good’.

63 As Mill stated:

[D]efenders of utility often find themselves called upon to reply to such objections as this – that there is not time, previous to action, for calculating and weighing the effects of any line of conduct on the general happiness ... The answer to the objection is that there has been ample time, namely, the whole past duration of the human species. During all that time, mankind have been learning by experience the tendencies of actions; on which experience all the prudence, as well as all the morality of life, [are] dependent ... It is truly a whimsical supposition that if mankind were agreed in considering utility to be the test of morality, they would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young, and enforced by law and opinion.

John Stuart Mill, ‘Utilitarianism’ in John Gray (ed), *On Liberty and Other Essays* (Oxford University Press, 2008) 155–6 (emphasis in original), cited in Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 11 (copy on file with authors).



Figure 1: The Virtue Arc: The 'good' qualities (virtues) needed by a TJ lawyer<sup>64</sup>

The virtuous TJ practitioner will have a range of personally 'good' qualities or virtues that ought to provide an edge in determining what to do, so that, 'if I am good, then so also will my actions be'. Views will differ as to what should or must be on this list of virtues (and defining this list is not a purpose here), but to put this proposition slightly differently, if self-aware selflessness distinguishes the TJ lawyer, then their impetus to relinquish self-promotion and paternalism may be stronger. And the model of the 'good person' (not just the 'good' person) is an ideal way to think about what one ought to do; so that the questions are – how would the good person think, feel etc and what would the good person then do? Dewhurst considers that the key for a TJ lawyer *seeking* virtue (because we tend to go on seeking rather than completely 'arrive') is to:

begin to look beyond the model of the good person and move into analysis of what makes the good person good. It is performance in accordance with these underlying criteria, the virtues, which make a person good. Further, the client becomes good through her efforts to embody the virtues and not through her efforts to emulate, idolize, comply with or imitate the model of a good person.<sup>65</sup>

In this sense, a TJ lawyer's self-examinations can be given guidance by the ideal of a good person acting as a regulating ideal on his or her psyche and actions.<sup>66</sup>

64 Adapted from Adrian Evans and John Howe, 'Enhancing Corporate Accountability through Contextual Ethical Exercises in Corporate Law Teaching' (2007) 7 *Journal of Corporate Law Studies* 337, 344.

65 Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 11 (copy on file with authors).

66 We are indebted to Justin Oakley for his observation that a slightly different way to invoke virtue ethics here is to talk about the range of arguably proper goals of lawyering – eg serving justice – and then to consider as professional virtues for lawyers the character traits that enable them to serve justice (whether or not those professional virtues are also ordinary virtues). See also Oakley and Cocking, above n 53.

## V CONNECTING VIRTUE ETHICS TO TJ

### A Why is Virtue Ethics Particularly Relevant to TJ?

Virtue ethics is particularly suited to maximising awareness of self and strengthening the individual virtues that can power TJ at the psychological level. TJ is an intellectual approach to the administration of justice which emphasises that in the formulation of the law, the way in which legal processes are conducted and the actions of judges, magistrates, lawyers and other legal officials, their effect on wellbeing of those affected is an important consideration. A TJ approach to legal practice in its broadest sense will see a lawyer taking a holistic approach to legal practice, viewing the client and the legal problem in terms of the multiple life domains – psychological, relational, social and economic – that affect client wellbeing and using legal practice techniques that promote a comprehensive resolution of the legal problem.

From this perspective, the rationale of holistic care is a more effective means of resolving conflict and achieving justice than any other jurisprudential construct. Holistic care is the rationale that is important to practitioners of TJ, just as the tension of ends versus means is important to consequential and Kantian ethicists. Inevitably, however, while the intellectual attraction of rationale is important to legal practice, it is insufficient if therapeutic considerations are to dominate. Therapeutic practitioners who are unaware of their ethical construct or, we suggest, comfortable only when deliberating in an intellectual manner about ethics issues, are unlikely to be able to achieve all that is necessary from therapeutic insights. Awareness of self (including awareness of the emotional self) is the key quality here.<sup>67</sup> Indeed, the ability to detect and manage the emotions of others (such as clients) requires the awareness of and ability to manage one's own emotions.<sup>68</sup> For example, TJ lawyers must be cautious that they do not transfer emotions arising from their own past experiences on to their client. While the consequentialist will think motives are important if they are important to the balance of the overall good, which in therapeutic contexts generally seems self-evident, and the Kantian lawyer would not wish to see the rights of others diminished by their own insensitivity, it is suggested that a virtue framework preconditions anyone to awareness of self. In so doing, virtue ethics strengthens the individual virtues that can provide the psychological power for TJ.

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67 Psychological research has established that self-awareness is the key driver of more intentional behaviour. See generally the discussion in David J Luban, 'The Ethics of Wrongful Obedience' in Deborah L Rhode (ed), *Ethics In Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000) 94. See also Ingar Brinck and Peter Gärdenfors, 'Representation and Self-Awareness in Intentional Agents' (1999) 118 *Synthese* 89; Archie B Carroll, 'In Search of the Moral Manager' (1987) 30(2) *Business Horizons* 7.

68 The emotional dimensions of TJ practice are discussed more fully in Silver (ed), above n 22. See also Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096.

Because virtue ethics is an inherent way of being, in practical terms, a virtuous lawyer can also fairly easily identify with the objectives of TJ and vice versa. This is so because a virtue ethics perspective encourages the lawyer to put to one side more prescriptive Kantian and utilitarian categories of right and wrong and refine their awareness of their own personal virtues in guiding and deciding what is right or wrong in a particular situation. Similarly, the TJ practitioner, at least unconsciously, seeks their caring objective out of a desire for reconciliation, from compassion or from a belief that this approach to legal practice is in the best interests of clients; and not just because TJ is likely to be more effective in dispute resolution than traditionally dominant approaches of retribution, rehabilitation or social engineering.

An example illustrates the close ‘mindsets’ of virtue and TJ: consider the prosecutor who chooses to support an application for a (holistic) diversion order in a case of family violence, who is doing so not only because it might be more effective in reducing the chance of recidivism, but also because the prosecutor remembers his or her own youth and its misdemeanours: memory for past failure is a virtuous quality. Secondly, the virtue of compassion could equip a lawyer to better sense the emotions of others (such as their client) and to react in an empathetic way: something that TJ sees as important in promoting client respect and also as a process that can help promote client motivation to change. In these ways, the virtues of understanding and compassion are relevant to being more effective as lawyers. Thus, rather than lecturing a client to ‘get real’ and ‘get their life together’, the TJ–virtue approach would be to facilitate the client exploring the reasons for their legal problem, listening and expressing empathy for the client and empowering the client to develop a plan to address the underlying issues and (further) develop the client's own virtues.

The TJ approach looks to all circumstances, constraints and objectives to maximise a holistic and potentially sustainable, even redemptive solution to conflict;<sup>69</sup> and similarly, the virtuous lawyer, confronted with the same plethora of factors, has personal qualities, such as courage, honesty, gentility practical wisdom and resolve, which can make it considerably easier to achieve TJ objectives.

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69 The TJ lawyer may see that a trial may be the best alternative for the client's wellbeing, as it may provide vindication for the client that promotes healing as well as providing a judgment. If the client wins, the other side is unlikely to think it is a win. But where reconciliation is the best outcome for the client, then the TJ lawyer will pursue it. But sustainability also requires that TJ cope with conflicting values. When values conflict, TJ does not automatically decide what should happen, but rather, ‘sets the stage for their sharp articulation’ (David B Wexler and Bruce J Winick, ‘Introduction’, above n 18, xvii) and ‘calls for an awareness of these consequences and enables a more precise weighing of sometimes competing values’: Bruce J Winick, ‘The Jurisprudence of Therapeutic Jurisprudence’ (1997) 3 *Psychology, Public Policy and Law* 184, 191. See also David B Wexler and Bruce J Winick, ‘Introduction’, above n 18, xvii–xx.

### **B Can a TJ Practitioner Function Appropriately with Any Other Ethical Method, apart from Virtue Ethics?**

This question may seem extreme; and even more so when put the other way: can a conscientious TJ practitioner be anything other than virtuous? If a lawyer's self-awareness as to ethical choice and of their capacity to fail were not critical to their virtue, the answer might be 'yes'. The argument might be put that a TJ lawyer's diligent attention to the care and healing of their clients, opponents, prosecutors and victims will surely not be wasted, whatever their internal sense of worth. But lack of personal awareness as to their inner strengths and weaknesses does not sit well with a virtuous lawyer because virtue requires intentionality and embodies the TJ quality of authenticity. The lawyer who does not know what choices they have because they do not really know themselves, cannot easily function in an autonomous, intentional manner and will struggle to be authentic. They may be even less fitted to practice therapeutically.

Behavioural choice is not quite the same thing as choice of ethical systems and sub-systems. While a TJ practitioner can seem to be a Kantian some of the time, a consequentialist on other occasions and profess the importance of virtue some or all of the time, at some point the imperative of ethics *per se* requires some sort of a choice as to what system fundamentally motivates them as an individual.<sup>70</sup> In this context, the Kantian emphases on the observance of individual rights and especially due process could seem closest to those of TJ and is therefore a natural choice for many lawyers. TJ literature – particularly relating to court processes – draws on procedural justice research to emphasise the therapeutic value of following not only the formal processes required at law but also demonstrating litigant respect for and trust in judicial officers. Moreover, it suggests that other values found to be important by behavioural science research, such as self-determination – can be used to promote therapeutic justice system outcomes, such as offender rehabilitation. Thus, it proposes that problem-solving courts, such as drug courts, can promote participant respect for their processes

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70 Baron, Pettit and Slote are accepting of the proposition that one can be ethical and still subscribe to a variety of ethical systems; in effect, that *to be* ethical requires this flexibility (see generally Baron, Pettit and Slote, above n 51), but others are less comfortable. Dewhurst's view is that it's difficult philosophically to shift between systems when it suits. He also comments:

For a Kantian, one is motivated by pure respect for the moral law and the categorical imperatives and maxims of reason; it is always this respect that must be guiding, no exceptions. For the consequentialists one is motivated by obtaining a desired end. It is true that sometimes one can achieve the desired end by following the dictates of reason. But according to Kant, the morality of an action is found only in the intention of the actor to comply with the moral duty not because of the desire to achieve a certain outcome. Often there is an attempt to blend a Kantian and consequentialist philosophy because there is a perceived need to draw upon the wisdom of Kant's dictate to never treat another human being as an end only. However, rule utilitarianism, and certainly virtue ethics, can draw upon the dictates of reason whenever they will bring about good, desirable or virtuous ends; but, also, the dictates of pure reason are capable of being adapted to address the needs of particular exceptional circumstances were compliance with the rule will not be just or equitable. This is the distinction between theoretical wisdom or pure reason and practical wisdom and equity.

Email from Dale Dewhurst to Adrian Evans and Michael King, 25 October 2011, 13 (copy on file with authors).

and orders and participant rehabilitation by giving them choice whether to enter a drug court program, by involving them in the determination of their rehabilitation program and in the resolution processes used to address any problems in their performance.

Similarly, a consequentialist approach will also be useful to a TJ practitioner who sees the need to achieve some sort of outcome (in the interests of resolving intractable arguments), as more important to overall therapies than the further delay that will probably be produced by concern for an overlong judicial process. An early plea of guilty and the opportunity to address an underlying offending-related drug problem may be seen by the TJ lawyer to be a better outcome for a client than an acquittal on a technical ground after a long-delayed trial. Also, an expeditious acceptable out of court settlement resulting from mediation may be better for a client traumatised by the legal process than a judgment after a lengthy trial.

Both major ethical systems can be construed to give self-awareness motives, etc significant weight, but the truly virtuous lawyer is closest to a fully therapeutic demeanour because they are by design and by necessity, self-aware. They are authentically reflective about what drives them, what holds them back and which of their biases and temperamental deficiencies interfere with their virtues. Such self-awareness (which might often be accompanied by and manifested in emotional intelligence), aids virtue by producing intentional behaviour in the lawyer and autonomous behaviour in the client.

The tentative conclusion is that a TJ practitioner who is ethically conscious will more often than not, attain maximum ethical energy if they are attentive first to their virtues rather than on rights *versus* consequences. Or put differently: appropriate processes and outcomes may be better achieved by a virtuous lawyer with a TJ focus.

### **C Challenges and Pitfalls for TJ Lawyers Lacking Virtue**

TJ heightens lawyers' and judicial officers' awareness of the emotional and psychological dimensions of clients/litigants and their legal problems. It suggests that the way in which they approach their work can help enhance client/litigant wellbeing. It borrows from counselling and other behavioural science practices to suggest techniques judicial officers can use in court and techniques lawyers can use in interacting with and advising clients.

While there is some degree of congruence or overlap between the wellbeing aspects of the law and legal practice and the health promotion goals of the health sciences, it is important for judicial officers and lawyers to remember that their expertise remains in the field of law and not psychology or counselling. While certain communication and motivational techniques can be used to improve the quality of interaction between judicial officer and litigant, and lawyer and client, and to promote the client's engagement in addressing legal problems and underlying issues, they must take care to ensure that their role remains within the bounds of the legal professional. Where a client has a problem requiring ongoing counselling or treatment, the lawyer should refer the client to the appropriate professional for assistance.

Further, TJ is not an unconditional licence for a lawyer to apply a personal but unsubstantiated view of therapeutic legal practice techniques. When it suggests therapeutic practices that lawyers can apply in their practice, TJ relies on practices that have a sound theoretical basis and have been found to be useful in practice. TJ requires an evidence base. The risk in lawyers using practices that do not have a sound theoretical basis and evidence to support their use is that they may produce anti-therapeutic effects. Thus virtuous lawyers seeking to take a therapeutic approach will need to apply the virtue of self-awareness and be mindful of the need to use substantiated therapeutic practices, avoiding any (doubly) conceited reliance on their virtues to judge if proposed decisions will be appropriate.

The practice of TJ-based lawyering not only requires ensuring that the boundaries of therapeutic legal practice are not transgressed but also a commitment to values that are consistent with consciously ethical thought and conduct in one's personal and professional life. It may be suggested that the techniques of TJ may be practised without any commitment to particular values but purely for instrumental ends, such as to secure the agreement of a client to a particular course of action. Thus one could emulate a moral emotional intelligence by callously demonstrating body language suggesting one is listening to a client, reflecting back to the client bits and pieces of what the client has said and use stock phrases to demonstrate apparent empathy with the client.

This approach involves a lack of authenticity; a lack of congruence between one's inner self and outer behaviour. A risk with taking that course of action is that its effects may be anti-therapeutic: the client may perceive a lack of authenticity in the lawyer's approach and experience resentment towards and reject the lawyer's assistance. Moreover, it is more than arguable that the presence of authenticity in the TJ lawyer's approach may be important in promoting a therapeutic effect, such as in supporting a criminal client's motivation to engage in positive behavioural change, which may be regarded as a coaching or leadership role of the lawyer.<sup>71</sup> In any event, it will not surprise anyone that the lawyer who fakes a therapeutic approach does so at his or her own risk, in that authenticity has been found to be important for individual self-esteem and wellbeing.<sup>72</sup>

Virtue ethics potentially has an important role to play in promoting authentic behaviour on the part of the lawyer seeking to take a TJ approach in that it can assist the lawyer in gaining a greater awareness of self and personal values and promote their expression in the lawyer's behaviour. Virtues, such as courage,

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71 Authenticity is regarded as an essential attribute of leadership: Donna Ladkin and Steven S Taylor, 'Enacting the "True Self": Towards a Theory of Embodied Authentic Leadership' (2010) 21 *Leadership Quarterly* 64. Moreover, therapist authenticity is widely seen to be important in therapy and to be an important part of the client healing process, see, eg, Jutta Schnellbacher and Mia Leijssen, 'The Significance of Therapist Genuineness from the Client's Perspective' (2009) 49 *Journal of Humanistic Psychology* 407. While lawyers are not therapists, at times TJ lawyers are seeking to promote a therapeutic effect in relation to the client so arguably their authenticity is important.

72 Brian M Goldman and Michael H Kernis, 'The Role of Authenticity in Healthy Psychological Functioning and Subjective Well-Being' (2002) 5 *Annals of the American Psychotherapy Association* 18.

truthfulness and self-respect, would have a particular role in promoting authenticity in behaviour. Indeed, it may be argued that a TJ approach to legal practice is not possible without the commitment to and application of these and other values such as compassion – as the above example illustrates.

Issues concerning authenticity also mean that there should be consistency between the values that inform the lawyer's professional life and those that inform the lawyer's personal life; or to put it colloquially, the avoidance of having one set of values for the office and another set for the home. Accepting and consistently applying values, such as truthfulness, friendliness and courage, in one's professional life but not in one's personal life (and vice versa), suggests a lack of authenticity, a degenerating fragmentation of the personality and a progressive lack of subjective wellbeing.

Some commentators attribute the high levels of mental illness and substance abuse in the legal profession to personal fragmentation, an inability to connect to and appreciate the inner self and the values that promote not only an ethical but also a healthy and rewarding professional and personal life.<sup>73</sup> Keeva sees the ideal concept of legal (and other work) as 'an activity in which the inner and outer lives come together in a meaningful engagement with the world'.<sup>74</sup> The practice of TJ by lawyers involves a meaningful engagement with all worlds in seeking to promote therapeutic values relating to the resolution of legal problems. TJ requires lawyers to be sensitive to their own inner life, to their virtues and vices, not only for the benefit of their clients but also for their own wellbeing.

## VI IMPLICATIONS OF LAWYERS' 'ETHICAL TYPES' FOR TJ

In addition to general ethical methods, there are several sub-systems of ethical types that apply specifically to lawyers but not lay people. These typologies can appeal more to lawyers than the general ethical methods described above because they are specifically attuned to the challenges facing lawyers. For example, Atkinson has categorised lawyers into three types. Type 1 is ostensibly morally neutral and will conscientiously do almost anything for their clients. In contrast, a Type 2 lawyer sees themselves as an 'officer of the court' and looks to public norms of propriety that may be a bit broader than the strict letter of the law and focuses on notions of justice, truth and honour. Type 3 is the lawyer as change agent, the provocateur who seeks out loopholes for reform purposes that they consider to be morally right.<sup>75</sup>

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73 Steven Keeva, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* (Contemporary Books, 1999).

74 Ibid 27.

75 Robert E Atkinson, 'A Dissenter's Commentary on the Professionalism Crusade' (1995) 74 *Texas Law Review* 259.

A second categorisation has been developed by Kohlberg. His theory of moral development<sup>76</sup> is more complex, but retains an intellectual bias and unfortunately eschews the emotional dimension that is needed in therapeutic awareness. Thus Kohlberg proposed six distinct stages of moral development, ranging from immature to increasingly more complex and sophisticated: Stage 1 is *Punishment and Obedience*; followed by Stage 2 *Instrumental Relativist* – involving mutual self-interest rather than aspiration; next there is Stage 3 *Interpersonal Concordance* – good behaviour is that which others approve of; Stage 4 *Law and Order* is more contemporary – laws govern behaviour and obeying the law is a duty; Stage 5 *Social Contract / Legalistic* – individuals behave according to social utility; and finally Stage 6 – *Universal Ethics*, which asserts that the best behaviour is governed by chosen universal ethical principles that transcend laws, and importantly, the rules of professional conduct.

Kohlberg's *Stages* have received much attention because they contemplate progression to successively higher levels of moral responsibility,<sup>77</sup> but Kohlberg proposes his higher levels as the territory of the aesthete: capable of being attained in an emotional vacuum and seeming to leave out the reality of emotional frailty, grief and personal failure. This deficiency is to some extent remedied by Parker, who has expounded on other's insights<sup>78</sup> to produce perhaps the most useful synthesis. She categorises lawyers' moral positions according to four distinct 'types', one of which can only be embraced with a profound sense of emotional self-awareness.

There is a further quality of diversity in the relationship between the primary classification system of consequential, Kantian and virtue ethics *methods* and what might be considered Parker's secondary classification of lawyers' *types*. The latter four-part classification, which has a strong resonance only for lawyers and are shaded visually in Figure 2 according to a suggested view as to their implicit 'popularity',<sup>79</sup> are as follows:

- *the adversarial or zealous advocate* is often dominant (hence the darkest shading) and oriented to the 'professional role', paradoxically acquiescing to the client's demands while reluctant to see any role for the lawyer as 'self';
- *the responsible lawyer* who (slightly less dark and in tandem with Kant), firmly and perhaps without much humour, gives an equally convinced

76 Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* (Harper and Row, 1984) 636–8.

77 Susan S Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337, 1396–7 notes Hartwell's finding that the 'Kohlbergian stages' of law students can increase significantly as a result of some professional responsibility courses. See Steven Hartwell, 'Promoting Moral Development Through Experiential Teaching' (1995) 1 *Clinical Law Review* 505, 522–30.

78 Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers Ethics' (2004) 30 *Monash Law Review* 49, 53–6.

79 We intend the term 'popularity' to denote what is most often, sometimes or occasionally adhered to by lawyers who give time to considering where they sit within lawyer's ethical types.



priority to the fairness of the dispute resolution process and lawyers' duties to courts;

- *the moral activist*, almost transparent in the ethical vista, is typically consequentialist and concerned for socially just outcomes, though still without much emotional awareness of others; and
- *the 'ethicist (or relationship) of care'*, who although a neutral shade in the popularity stakes, walks closely enough in the footsteps of Aristotle's virtues to wish to nurture the relationship between lawyer and client. This is the type of lawyer who could well be both virtuous and emotionally intelligent, and while not disregarding holistic solutions to difficult problems, seeks to maintain that relationship as both the method and purpose of their client interactions, confident that the power of relationships per se gives meaning to an otherwise capricious legal system and sustains people (lawyers and clients) through its lengthy and often painful processes.

Figure 2: Interrelating Legal Ethical Types



Lawyers who are able to consciously determine that one of these four ethical approaches (or even a combination of more than one approach) most closely meets their own preferences are, regardless of that choice, likely to be better positioned to deal with the complexities of the therapeutic approach. Although

each classification addresses a different preference, practitioners can shift their focus between these types in differing circumstances and in respect of different clients. In fact, any lawyer will commonly and validly use *some or all* of these approaches in different situations, but not, it is suggested, with the same power of effect if they are unaware of their preference and of their emotional investment in same. The important point here is that while a TJ practitioner cannot divorce themselves from the major moral philosophical traditions and in particular, from virtue ethics (so that in our view, determining which elements to use is governed by deciding whether or not such use promotes the attainment of the virtues), those who operate effectively will require *personal awareness* of their ability and need to make an ethical choice from these categories at some point, in reaching many decisions. Their consciousness of their own investment in making an ethical choice *not* the propriety of the choice itself or of willingness to simply comply with any single code of conduct provision is a key quality in all lawyers, but particularly in a TJ practitioner.

## VII STRENGTHS AND LIMITATIONS OF AN ETHIC OF CARE FOR TJ

Some TJ lawyers will prefer to consider their options only in terms of general ethical methods while others, perhaps a majority, will find the four lawyer types more accessible. Thus in dealing with a client, a zealous lawyer may take into account only the client's wellbeing and use strategies that promote that. A responsible lawyer would use strategies that promote wellbeing for the client and others, provided professional practice rules are not compromised. A moral activist would see wellbeing in terms of wider social concerns and individual wellbeing, subject to that wider concept. Finally and most importantly for TJ, there is the ethicist of care, for whom wellbeing is primarily a question of nurturing and strengthening relationships by respecting autonomy, recognising individual preferences and promoting informed decision-making.

This last type of lawyer, who recognises Gilligan's championing of compassion and respect in human behaviour<sup>80</sup> and self-identifies as *caring* for those around them ahead of other objectives in their professional life, will resonate especially with a modern TJ practitioner. Many if not most of those who reflect on the essential moral quality of a TJ practitioner will be inclined to confidence that the search for an ethical basis to their working lives begins and ends with the ethic of care. It has been suggested that the ethic of care and TJ are so clearly interlinked that to propose that any other ethical relationship could be richer for purposes of TJ exposition, is perfidious and nonsensical. It is therefore important to explain why the ethic of care, while of self-evident importance to TJ, does not in the end focus a TJ lawyer's moral attention adequately, even at

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80 See generally Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

the risk of seeming to deny the close and obvious connection between a therapeutic orientation and obvious respect for a client's preferences and autonomy.

This explanation begins with a criticism of the proposition that an ethic of care can completely and sufficiently describe the TJ practitioner as someone who both cares for the client and in turn, receives a response to their care. This is so since a *relationship* of care by definition must be two-way and not just a case of the lawyer providing care to the client and necessarily remaining indifferent to whether that care is acknowledged. However there are many situations of lawyer care where the fact of that care is not acknowledged and in fact, is commonly misunderstood or plainly rejected, for a host of reasons connected with client misunderstanding of the legal system, mental illness, personality disorder and other more compelling or mundane demands on the client's attention and loyalties. Frequently, caring efforts of the TJ lawyer are as naught in the eyes of the client. An ethic of care, profoundly based as it is in continuing relationship, cannot gain traction as a fully satisfactory basis for the ethical construct of TJ in these circumstances. The scholarship and commentary surrounding lawyers' care for their clients is extensive and convincing of the benefits to clients,<sup>81</sup> but these conceptions of relationship tend to involve a one-way care flow in the client's direction, even if nothing inherently stops the return of care to the lawyer from their client. Practitioner benefits from such care are usually posited in terms of case efficiency, competence and skilled technique (all true), rather than lawyers' own moral growth or benefit and if friendships are formed and lawyers develop a therapeutic mindset, then those outcomes are incidental.

The recognition of the importance of care to ethical behaviour came, unsurprisingly, out of gender awareness:

Whereas the ethic of justice is founded on the idea that everyone should be treated equally, the ethic of care requires that no one should be hurt. Whereas men tend to stand on principle and act according to people's rights irrespective of the consequences, women are more pragmatic, being more concerned to uphold relationships and protect their loved ones from harm. Whereas the ethic of justice assumes that one can resolve moral dilemmas by abstract and universalistic moral reasoning, the ethic of care requires due attention to context and the specific circumstances of each moral dilemma. And in resolving such dilemmas, men tend to rank ethical principles, whereas women attempt to address the concrete needs of all and to ensure that if anyone is going to be harmed it should be those who can best bear the harm.<sup>82</sup>

But the ethic of care has for many, convincingly developed well beyond a gender analysis and is now legitimately understood to encompass the willingness of a lawyer to consider a whole host of relational, contextual, moral and

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81 See, eg, David A Binder et al, *Lawyers As Counselors: A Client-Centered Approach* (Thomson/West, 2<sup>nd</sup> ed, 2004); Avrom Sherr, *Client Care for Lawyers* (Thomson Professional, 2<sup>nd</sup> ed, 1998); Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (Oxford University Press, 3<sup>rd</sup> ed, 2007).

82 Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (Butterworths, 1995) 36.

emotional considerations in their decision making.<sup>83</sup> An ethicist of care will look at whole networks of relationships, of obligations and relevant legal rules, and will not necessarily see rule compliance as critical in their quest to avoid harm to those for whom they are caring. Ethicists of care (just as consequentialists, Kantians, virtue ethicists, zealous advocates, responsible lawyers and moral activists, in their own way) are passionate for their perspective and can tend unconsciously towards a ‘woolly’ mission: that is, they can be gentle and polite missionaries seeking conversion of others, especially other lawyers, to careful behaviour in all their relationships. They may also recognise that within *relationship*, there are possibilities for their own moral development, in the sense that carefulness can grow from emotional experience and an ethic of care includes lawyer’s self-care.<sup>84</sup> But this recognition is about as far as the ethic of care and other ethical methods and sub-categories can take a TJ practitioner, because the concept of care as such does not fully approach the ‘good’ relationship (along with the other systems and categories, excepting virtue ethics) and still often involves a predominantly intellectual process focussed on others.

The ethic of care is faintly superior but insufficiently substantial, demanding little from the lawyer in the way of personal growth. There is some recognition of self-care but very little is required in the way of interior ‘work’ on self-understanding, particularly how active introspection on the quality and integrity of one’s own motives can influence decisions. Such self-awareness is crucial for TJ legal practice because it goes to the lawyer’s ability to be emotionally authentic and to develop a balanced, mature awareness of how past experiences can affect one’s own perceptions and interactions with others. TJ lawyers’ emotional maturity, expressed as a function of authentic self-awareness, is a key aspect of TJ literature.<sup>85</sup>

Lawyers can fairly readily ‘care for themselves’ as TJ lawyers in a narrow manner, seeing such care as protecting themselves from too much relational pain, without going deeper and looking at what they are surreptitiously deriving from legal practice that may be at odds with their general caring orientation. In short, self-care does not automatically involve self-criticism and the sort of self-examination that a TJ lawyer needs – and may be expected to display – in their moral bedrock, if they are to be authentically therapeutic individuals. If TJ lawyers are to avoid paternalism and sometimes hidden self-gratifications that can come from ‘being good’ or ‘doing good’, they may need more than a cerebral ethical framework or an emotional relative one.

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83 Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young University Press, 1981); Thomas L Shaffer and Robert F Cochran, *Lawyers, Clients and Moral Responsibility* (West Publishing, 1994).

84 Mark Weisberg, ‘Integrating Personal and Professional Lives: An Essay on Thomas Shaffer’s on Being a Christian and a Lawyer’ (1984) 9 *Queen’s Law Journal* 367.

85 This is a central theme in Marjorie A Silver, ‘Love, Hate, and other Emotional Interference in the Lawyer/Client Relationship’ in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law As A Helping Profession* (Carolina Academic Press, 2000) 357.

Another part of the limitation of an ethic of care arises in the discourse about the ethic itself: it is typically portrayed as whiter than white; centrally compassionate and outwardly focussed on 'the other' around them, rather than also and expressly inwardly-focussed on a lawyer's own limits, fragilities and ignoble intents, but assuming regardless that the lawyer will address others' environments and relationships from a position of benevolent power and pristine strength. This orientation seems quite risky. Can a continuous and total goodness be observed in anyone, even if they are generally known to be a 'good' lawyer?<sup>86</sup> Certainly a virtue ethicist cannot claim such superiority if they are true to the inbuilt requirement for introspection on their virtues and their failures. The sense of compromised complexity can feel at times overwhelming and it is doubtful if any lawyer who looks inward feels otherwise. And while the ethic of care does not prohibit such introspection and would encourage it, there is a central and paradoxical barrenness within its formulation that champions all-out caring but does not make any compelling claims on the inward path that true care seems to demand. Some of the TJ literature does emphasise judicial officers and lawyers exercising an ethic of care but these references are in terms of the lawyer's actions *towards* the client.<sup>87</sup> And an ethic of care can be cloudy as to the relativities of powerful and powerless relationships:

[T]he ethic of care does much to advocate for the promotion of caring relationships but does little to provide criteria for determining which relationships are worth promoting. For example, there is much that can be done to promote the relational functionality of a den of thieves or the continuation of an abusive domestic relationship; this does not mean it would be ethical to preserve these relationships. The ethic of care is theoretically insufficient to help us make these kinds of distinctions between valuable and non-valuable relationships.<sup>88</sup>

The argument is that to exercise the kind of skills TJ requires in an authentic and effective manner, a practitioner requires an acute and mature self-awareness, which is valued most by virtue ethics.

Accordingly, since a TJ practitioner should be very good at analysing the networks of obligations and allegiances that will need to be accounted for in minimising harm, consideration of these competing claims according only to an ethic of care will be self-limiting. It is suggested that a conscious virtuous approach is stronger and more resilient because it is essentially self-correcting and self-limiting, such that the ethic of care can be seen, for purposes of this exegesis, as a subset of virtue ethics<sup>89</sup> rather than a standalone ethical category.

A lawyer-carer cannot sustain genuinely caring behaviour without a flourishing sense of goodness *and* some self-awareness of the risks entailed in any sense of certainty about their contribution. Their virtues will include a sense of provisional self-respect as much as respect for their clients. Imagine the

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86 As practitioner and judicial officer, we cannot see that constancy in ourselves.

87 That is, promoting client voice, validation, respect, self-determination and the exercise of interpersonal skills, such as active listening, the expression of empathy and the use of motivational interviewing techniques. See, eg, Wexler, *Rehabilitating Lawyers*, above n 21.

88 Our thanks to the anonymous reviewer who raised this point.

89 In the same manner as is advocated by Rachels and Rachels: see above n 36, 157.

criminal defence counsel who is soured by constant encounters with male violence to women and who is by degrees, less and less able to seek creative and restorative approaches to male clients' offending, cycling into cynicism without realising it. The therapeutic legal practitioner is no automatic paragon (of virtue) or island unto themselves and may come to appreciate that self-awareness of their virtues can combat the isolation that can come with progressive cynicism. In expounding the linkages between TJ and virtue ethics, it is likely that therapeutic lawyers will appreciate that they are and must be, close compatriots.

A TJ practitioner will be well served by a virtuous orientation – as supported by an ethic of care – seeing themselves and their client as far as possible in the context of a web of autonomous and respectful relationships. Thus, the ethical duty in many cases would first be to know themselves and then to advise their client, where appropriate, of all of the possible effects for them and others arising from the differing options available to resolve the legal problems; and to suggest one that promotes their client's best interests while minimising the negative side effects on other people, as represented very often by the interests of justice.

It is now useful to locate such caring inside the wider, 'tougher' virtue framework which, while absorbing the qualities often associated with an ethic of care (for example, of compassion, loyalty and dependability) also compensates and provides context for client rejection by emphasising additional signs of virtue, such as a search for justice, beneficence, resilience and lawyer self-respect.

Virtue ethics contains these qualities, but calls them virtues. A virtue ethics model for TJ does not demand client acknowledgement and is not paternal/maternal in nature because it contemplates that TJ lawyers and their clients will disagree in cases, for example, where the interests of beneficence or justice require wider considerations than what their clients want or instruct. In the end, while an ethic of care takes TJ well down the path of ethical meaning, it loses traction when the lawyer–client relationship breaks down because of disagreement as to the priority of a compelling therapeutic objective or because the lawyer themselves loses their way due to their own poorly recognised frailty. When this happens, TJ–virtue ethics provide for a holistic roadmap towards ethical behaviour.

## VIII CONCLUSIONS

If the congruent mindsets of virtue ethics and TJ are to be most effective in minimising negative effects of the lawyering process and maximising 'goodness' in the practice of law, their parallel insights into the motives, aspirations and techniques of moral legal practitioners are crucial. At least, the emphasis may well be on enhancing lawyer self-awareness of TJ–virtue links; but at best, TJ and virtue ethics are at one in encouraging the modern lawyer to seek virtue, *consciously* emphasising the use of strategies that are appropriate to promote the virtues in a particular legal context. It may be that in a particular legal context, there is an overlap in strategies and means used by different lawyer types, but that overlap does not diminish the power of virtue ethics to motivate and strengthen the TJ practitioner.